Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

VESTED GIFTS TO A CLASS AND THE RULE AGAINST PERPETUITIES.

PROFESSOR GRAY, in § 121 b of the second edition of his Rule against Perpetuities, puts this problem: he supposes an immediate vested bequest to the grandchildren of A,[1] a living person, to be paid to them at twenty-five. A has one grandchild *in esse* at the testator's death who is three years old. Is there a valid gift to that grandchild? Professor Gray answers this question in the affirmative.

The learned author concedes that by the usual rule, apart from the Rule against Perpetuities, the expressed intent that the time of payment of the principal of the share of the grandchild *in esse* at the testator's death shall not be paid until he attains, or would have attained had he lived, the age of twenty-five, is valid and enforcible. This is so of course where Claflin *v.* Claflin[2] is law. It is also the law where the rule of Saunders *v.* Vautier[3] is recognized, because the gift is not to an individual, but to a class.[4] He concedes also that the usual rule for the determination of classes allows the class to increase till the eldest grandchild *in esse* at the testator's death actually reaches, or would have reached if he had lived, the age of twenty-five,[5] — viz.: possibly more than lives in being and twenty-one years after the testator's death. He also concedes that the mere fact that a gift is vested in some member of the class does not prevent the gift to the whole class being void for remoteness, and that the Rule against Perpetuities causes the gift to the whole class to fail if the maximum number of the class is not ascertained within the proper time, although the minimum number may be.[6]

[1] The actual language used by the learned author is "testator" instead of "A," but the case actually discussed would require the limitations to be either to the great grandchildren of the testator or to the grandchildren of A, a living person at the testator's death.

[2] 149 Mass. 19.

[3] 4 Beav. 115, s. c. Cr. & Ph. 240.

[4] Oppenheim *v.* Henry, 10 Hare 441.

[5] Gray's Rule against Perpetuities, 2d ed., § 121 b.

[6] Gray's Rule against Perpetuities, 2d ed., § 205 a; see also Pitzel *v.* Schneider, 216 Ill. 87.

How, then, in the case put, is the gift to the class to be supported as valid in those members of the class who are *in esse* at the testator's death?

Without attributing to the learned author either of the following views in support of his conclusion, one is presented which, it is thought, would be unsound and another which, it is submitted, is valid.

An attempt might conceivably be made to support the gift to the grandchild of A *in esse* at the testator's death upon the following propositions: in the limitations "to the grandchildren of A to be paid at twenty-five" there are two gifts — one to the grandchildren of A living at his death, and the other to such grandchildren of A as may be born after his death and before the eldest grandchild of A born at the testator's death actually reaches, or would have reached had he lived, the age of twenty-five. These two gifts are each expressly limited by separate and distinct clauses — the one to the grandchildren of A *in esse* at the testator's death by the words "to the grandchildren of A," and the gift to the after-born grandchildren of A by the words "to be paid at twenty-five." The former is valid, and the latter void for remoteness. Under the familiar rule which allows the rejection of modifying clauses [1] the latter may, upon the assumption already made that the two gifts are created by separate and distinct clauses, be disregarded, leaving the valid gift to the grandchildren of A *in esse* at the testator's death to stand.[2]

Doubt as to the soundness of this solution naturally centers about the correctness of the premise that the gift to the grandchildren of A *in esse* at the testator's death, and the distinct gift to those born afterwards, are limited by separately expressed clauses. Whether doubt on this point be well conceived or not seems to turn more particularly upon whether the words "to be paid at twenty-five" contain the separate gift to after-born grandchildren of A exclusive of the words "to the grandchildren of A," or whether the latter words really contain the gift to the after-born grandchildren. The question then really becomes one of the proper analysis of the operation of the rule for the determination of classes in this sort of a case. If the words "to the grandchildren of A" by their primary meaning include only grandchildren of A at the testator's death, so that the class is enlarged by the presence

[1] Gray's Rule against Perpetuities, 2d ed., c. 13.

[2] *Ibid.*, 2d ed., § 442.

of the words "to be paid at twenty-five," it is possible of course to argue that the words "to be paid at twenty-five" actually contain the gift to the after-born members of the class. Yet this is an unreal course of reasoning. The words "to be paid at twenty-five" have on their face nothing whatever to do with the gift to after-born members of the class. It is the clause "to the grandchildren of A" which really contains the gift to the enlarged class, even though the enlargement of the class depends upon the words "to be paid at twenty-five." The words "to be paid at twenty-five" merely fix the actual meaning of the words "to the grandchildren of A." The rule of law which the postponement of the period of distribution causes to operate determines the meaning of the words "to the grandchildren of A." You never get away from the fact that the gift to the class is contained in the words "to the grandchildren of A." This view, it is believed, is founded upon the actual reality of the language which we have to deal with. If the words "to the grandchildren of A" by their primary meaning include all the grandchildren of A born at any time, so that the rule for the determination of the class restricts the class to those *in esse* at the first period of distribution, then you cannot possibly say that there is any gift to after-born members of the class in the words "to be paid at twenty-five." The whole gift, to whomsoever it may be, comes from the words "to the grandchildren of A."

So much, then, for the consideration of this solution of our problem apart from authority. Are there any settled results which throw light upon whether the words "to be paid at twenty-five" contain a separate and distinct gift to grandchildren born after the death of the testator?

Reliance might, perhaps, be placed upon Clobberie's Case.[1] There it was held that a legacy to A *to be paid* at twenty-one gave A at once an interest transmissible to his executors. It has since become the law that the expressed intent that the legacy shall not be payable to A until he reaches twenty-one is valid, while an expressed intent that a legacy shall not be payable until after the majority of the beneficiary is invalid and unenforcible.[2] What possible significance, however, do these results have upon our problem? Clobberie's Case holds that certain language means that an immediate interest is given to A, but that the actual trans-

[1] 2 Vent. 342.

[2] Saunders *v.* Vautier, 4 Beav. 115, s. c. Cr. & Ph. 240.

fer of the principal to the legatee shall not be made till a future time, and that this intent is lawful provided the postponement be not beyond the minority of the legatee. If the postponement was to last beyond that time it was illegal and could not be carried out. These results throw absolutely no light whatever upon the question whether, where the gift is to a class to be paid at twenty-five, there is a separately expressed gift to after-born members of the class contained in the words "to be paid at twenty-five."

Leake *v.* Robinson[1] furnishes a strong argument against the view that the words "to be paid at twenty-five" contain a separate and distinct gift to grandchildren born after the death of the testator. Under that case, if the limitations are contingent, *i. e.* "to such grandchildren of A as reach twenty-five," and there are grandchildren *in esse* at the testator's death, all under four years of age, you cannot say that there are two gifts — one to the grandchildren of A *in esse* at the testator's death who reach twenty-five, which is valid, and the other to after-born grandchildren of A who reach twenty-five, which is too remote, and then reject only the latter on the ground that the gifts are expressed separately. The reason is that there is no express separation of the gift to the two different classes of grandchildren. There is, on the contrary, only a singly expressed gift to the whole class. You cannot argue that the primary meaning of the words "to such grandchildren of A as reach twenty-five" includes only grandchildren of A living at the testator's death who reach twenty-five, and that the class is allowed to increase, so as to include after-born grandchildren of A till the first reaches twenty-five, by reason of the fact that a contingency is introduced in the words "to such as reach twenty-five." You cannot then go on to conclude that the gift to after-born grandchildren of A is contained in a separate clause making the gift contingent so that it may be rejected by itself, leaving the contingent gift to grandchildren of A *in esse* at the testator's death to stand. Why is it any more allowable, when the gift is vested "to the grandchildren of A to be paid at twenty-five," to say that the primary meaning of the testator's language includes only grandchildren of A *in esse* at the testator's death, but that the words "to be paid at twenty-five" make a new and distinct gift to after-born grandchildren of A? As a matter of fact, however, the Master of the Rolls in Leake *v.* Robinson intimates that the primary and natural meaning of "grandchildren of A to be paid at twenty-

[1] 2 Mer. 363.

five" or "who reach twenty-five," includes all the grandchildren of A born at any time, and that the rule for the determination of classes restricts the natural meaning of the words used because of the inconvenience arising from the natural construction.[1] This is the position Mr. Gray himself approved in the first edition of his Rule against Perpetuities.[2] May not this opinion of the learned author still be the correct one? In this view the primary meaning of a vested gift "to the grandchildren of A to be paid at twenty-five" is plainly a gift to *all* the grandchildren of A born at any time. The words "to be paid at twenty-five," then, restrict the primary meaning, and there is no possible ground for contending that these words contain a distinct gift to after-born grandchildren of A which is expressly separable from the gift to the grandchildren of A *in esse* at the testator's death.

It is believed, however, that the natural desire of courts to sustain the gift to the members of the class *in esse* at the testator's death may be accomplished by the application of a general principle already fully established in England and now rapidly shaping itself to meet the situation in the jurisdictions in this country where Claflin *v.* Claflin is law.

Where the limitations are to the grandchildren of A to be paid at twenty-five, the after-born members of the class are let in, whether by way of enlargement of the naturally indicated class or by way of restriction of it, because the postponement of the first period of distribution till the eldest reaches twenty-five, or would have done so had he lived, is recognized as valid and enforcible. If, then, there is any ground upon which, consistently with its validity in general, the postponement can be regarded as void and unenforcible in this case, then the future period of distribution will cease to exist, and under the usual rule for the determination of classes, the class will close at the testator's death. This ground is most clearly available, and no one has pointed it out more forcibly and accurately than Mr. Gray himself. When it became clear in England that restraints on the alienation of the absolute equitable interest of a married woman were valid, the question naturally

[1] He says: "Indeed, I believe, wherever a testator gives to a parent for life, with remainder to his children, he does mean to include all the children such parent may at any time have. That is not an artificial rule. It is the rule which excludes any of the children that is, and has been called an artificial rule — namely, the rule in Andrews *v.* Partington, 3 Bro. Ch. 60, 401, and other cases of that description, which excludes all who may be born after the eldest attains twenty-one."

[2] § 639.

arose whether any restriction upon their creation should be imposed. The point was presented for adjudication when the absolute equitable interest had vested in an individual within lives in being and twenty-one years, but where the restraints on anticipation might possibly occur or continue beyond that time. It became settled that the restraints on alienation were invalid under such circumstances.[1] It was said that this was so because the Rule against Perpetuities applied. With this reasoning Jessel disagreed, and Mr. Gray has now most clearly pointed out that Jessel was correct in saying that the Rule against Perpetuities had nothing to do with the matter.[2] It follows, therefore, that the result reached by the English cases is simply the establishment of a special rule — entirely distinct from the Rule against Perpetuities — limiting the extent to which restraints on alienation, usually valid, may be created. In the same way, when you come to an American jurisdiction where Claflin *v.* Claflin is law, it becomes absolutely necessary to put some limits upon the length of time that the trust of an absolute indefeasible equitable interest may be made indestructible. The direct authority of the English cases which have dealt with the restraints on anticipation attached to a married woman's estate, and the suggestion of the courts of Massachusetts,[3] Illinois,[4] and Pennsylvania[5] all indicate that the rule will probably be well settled here that language which, if carried out as expressed, may possibly cause the trust of an absolute indefeasible equitable interest to be or remain indestructible at a time beyond the period of a life or lives in being and twenty-one years, will be unenforcible. It cannot of course be too emphatically stated that this is not the Rule against Perpetuities, but a new rule limiting the time that the trust of an absolute indefeasible equitable interest may be made indestructible.[6] No reason is perceived why this same principle should not operate where the rule of Oppenheim *v.* Henry applies; that is, where the gift is to a class with a postponement. When, therefore, the limitations are "to the grandchildren of A to be paid at twenty-five" and one grandchild

[1] Gray's Rule against Perpetuities, 2d ed., § 432 *et seq.*

[2] Gray's Rule against Perpetuities, 2d ed., § 121 f.

[3] Winsor *v.* Mills, 157 Mass. 362.

[4] Kohtz *v.* Eldred, 208 Ill. 60, 72.

[5] Shallcross's Estate, 200 Pa. St. 122 (1901). See also a statutory provision to the same effect in Kentucky: Ky. Stats. (1903) § 2360; Johnson's Trustees *v.* Johnson, 79 S. W. Rep. 293 (Ky., 1894).

[6] Gray's Rule against Perpetuities, 2d ed., § 121 i.

of A is *in esse* at the testator's death and under four years of age, it is clear that the postponement is sure to last for too long a time. The expressed intent is, therefore, unenforcible, and the gift is to the grandchildren of A simply. Those, therefore, who are *in esse* at the testator's death take by the usual rule for the determination of classes.

This is precisely the solution of the problem which Mr. Gray made in the first edition of his Rule against Perpetuities,[1] except that there he regarded the postponement as void by the rule of Saunders *v.* Vautier. This necessitated the position that Oppenheim *v.* Henry was wrong. Now, however, it is clear that Oppenheim *v.* Henry is sound, but that there is a limit set to the power of the settlor to create a postponement even where the gift is to a class. That limit requires that the postponement must not exist beyond a life or lives in being and twenty-one years. It is submitted that it would be wiser to continue the view of the first edition with this change than to enter upon the difficult course of trying to split up the limitations "to the grandchildren of A to be paid at twenty-five" into two separately expressed gifts — one to the grandchildren of A *in esse* at the testator's death, which is valid, and the other to the grandchildren of A born afterwards, which is too remote.

Albert Martin Kales.

NORTHWESTERN UNIVERSITY LAW SCHOOL.

NOTE. — I am much obliged to Professor Kales for pointing out (as he does in the first note to his article) that the case put in § 121 *b* does not raise the question intended to be discussed. The devise should read "to the grandchildren of A" (or to the great grandchildren of the testator, or on some such limitation), "to be paid to them when they reach twenty-five."

The first part of Mr. Kales's article is devoted to demolishing a "conceivable" adversary who is supposed to say that the devise consists of two gifts. There is somewhere in the books — I believe it is in the Kentucky reports — a case where a judge, irritated past endurance by the stupidity of a plaintiff, exclaims, "And what has this blooming geranium of a plaintiff to say?" The appellation is a trifle vague, but it somehow fits this "conceivable" gentleman. He is a foeman quite unworthy of Mr. Kales's skillful rapier. I certainly shall not come to his assistance. Let him be anathema.

The true view is, of course, that there is a single gift with a qualification, modification, or proviso attached.

The latter part of Mr. Kales's article raises a curious question. It can be put as well, and more simply, by a gift to an individual. Suppose, in a *Claflin* country, a legacy is given to the first-born son of A, to be paid him when he

[1] § 638.

reaches twenty-five. A is at present a bachelor. I trust I have shown that the estate to A's first-born son does not violate the Rule against Perpetuities, since it begins within the required limits ; I do not understand that Mr. Kales differs from me in this.

But he says: *Claflin* courts must adopt some period beyond which enjoyment cannot be postponed; they will probably take it from the Rule against Perpetuities. This is certainly very likely.

Then the question comes up: From what date is this period to run? If it is to run from the testator's death, then the postponing clause is void. If it is to run from the beginning of the interest which is subject to the postponing clause, then that clause is good. Mr. Kales thinks it will be the former. If I were to guess, I should be inclined to venture an ambulatory guess that it will be the latter.

It seems a troublesome and difficult question. I feel no present call to enter upon it.

> "Suave, mari magno turbantibus aequora ventis,
> E terra magnum alterius spectare laborem."

or, translating rather freely:

"Pleasant it is, from the firm land of the Common Law, to watch the votaries and victims of *Claflin* v. *Claflin* tossed among its rocks and quicksands."

John C. Gray.